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No. 543

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

GORDON L. HARMSEN,
Petitioner and Appellee, below,

vs.

DEANE FIZZELL, THEO FIZZELL,
WILLIAM JOHNSTON and DONNA JOHNSTON,
Respondents and Appellants below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN, AND BRIEF IN SUPPORT THEREOF

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TO: The Honorable, Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

May it Please the Court:

Petitioner, Gordon L. Harmsen, respectfully petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of Michigan.

(a) The first two opinions of the Supreme Court of Michigan rendered in this case December 24, 1957, are reported at 351 Mich. 86, and copies thereof are appended hereto as Exhibit "A". The subsequent three opinions rendered July 15, 1958, after rehearing was granted, resulting in reversal of the first decision, are appended hereto as Exhibit "B". The three opinions of the Michigan Supreme Court in the case of *Fritts vs. Krugh* rendered October 13, 1958, a companion case to the

case in question, in which two cases the position of the Michigan Supreme Court is irreconcilable as is conceded by Mr. Justice Black in his dissent, concurred in by Justices Voelker and Smith, are appended hereto as Exhibit "C". The Honorable Court's attention is directed to the fact that Mr. Justice Edwards, who wrote two dissenting opinions in the instant case, completely reversed himself as is evidenced by his majority opinion in the companion case.

(b) The grounds on which the jurisdiction of this Court is invoked are as follows:

The first two opinions of the Supreme Court of Michigan, which affirmed the Circuit Judge in a lower court, were filed December 24, 1957, and Order entered accordingly. A rehearing was granted Respondents by an Order of March 4, 1958, and the second dividing opinions, resulting in a reversal of the original decision, were filed July 15, 1958, and Order, as directed by the Supreme Court was entered in the trial court on August 6, 1958.

Order denying Petitioner a rehearing was filed September 11, 1958.

> "The finality of a state judgment, for purposes of review in the Supreme Court, whether by appeal or certiorari, is suspended during the pendency of a petition for rehearing before the state court, and where a petition for rehearing is entertained, the state judgment does not become final until the petition has been denied or otherwise disposed of by the state court." *Citizens Bank of Mich. City v. Opperman*, 249 U. S. 448, 63 L. Ed. 701, 39 Sup. Ct. 330; *Northern Pacific R. Co. vs. Holmes*, 155 U. S. 137, 39 L. Ed. 99, 15 Sup. Ct. 28.

Jurisdiction of the United States Supreme Court to review by Writ of Certiorari in this case is conferred by Section 1257 (3), Title 28, *Federal Code Annotated*, as follows:

> "Final judgments or decrees rendered by the highest court of a state in which decision could be had may be reviewed by the Supreme Court as follows:
>
> • • •

"(3) By Writ of Certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of United States."

(c) The questions presented for review are:

1. When the Michigan Supreme Court, in three divided opinions, as a result of a rehearing granted Appellants below for no new justiciable reasons, but which merely considered the same facts and points of law originally considered, using the same briefs and appendices originally used, which denied counsel an opportunity for oral argument, reversed a prior decision of the Michigan Supreme Court (351 Mich. 86) which had duly considered all aspects of the case, affirming the Orders of the trial judge in a lower court granting Petitioner writs of habeas corpus after determining that the Juvenile Division of the Probate Court was without jurisdiction to make any Orders whatsoever with respect to Petitioner's children and that Petitioner was a fit person to have custody of his own children, said matters being res judicata, was Petitioner and appellee below legally denied his constitutional right to writs of habeas corpus for the return to his custody of his two minor children illegally withheld from him by respondents?

2. When Petitioner and appellee below was deprived custody of his children by virtue of the second decision of the Michigan Supreme Court, reversing the first decision, as a result of a rehearing, which said rehearing and subsequent reversing decision were made possible *solely* due to a change in the personnel of the Michigan Supreme Court, Mr. Justice Sharpe, ranking member of said Court who wrote the ruling opinion in the first decision, having retired after 24 years on the bench, and having been succeeded by Mr. Justice Kavanagh, who participated in both the granting of rehearing and reversal of the original decision, although he had been Attorney General for the State of Michigan, at the time the case was originally considered, and as such, and under the rules of the Michigan Supreme Court had been served copies of briefs as a party in interest, was Petitioner denied his constitutional right of due process of law?

3. When the Michigan Supreme Court disregarded the Michigan Statutes relative to Juvenile Division of Probate Courts, as well as its own prior decisions relative to the granting of rehearings and law of the case, and when the former Attorney General for the State of Michigan, who had been a party in interest at the time this case was originally under consideration, participated in the granting of a rehearing as well as the subsequent reversal of his predecessor's ruling opinion, although he did not participate in the companion case of *Fritts vs. Krugh* (Opinions Appended), was Petitioner, in violation of the equal protection clause of the constitution, arbitrarily discriminated against?

4. When Petitioner was deprived of custody of his children by virtue of the second decision of the Michigan Supreme Court which held that the Juvenile Division of the Probate Court had jurisdiction of said children, notwithstanding the fact that the statutes clearly outline the necessary steps for acquiring jurisdiction and these were in no wise complied with and a long line of cases in Michigan hold that Probate Courts are courts of limited jurisdiction that derive none of their power from the common law, and must, therefore, strictly comply with the statutes, thus ignoring the statutes, as well as the doctrines of stare decisis and res judicata, was Petitioner denied his constitutional right of due process of law?

(d) The following Michigan Statute and provisions of the Constitutions of the United States and of the State of Michigan are involved in this case:

> "Except as provided herein, the juvenile division of the probate court shall have:
>
> • • •
>
> (b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county
>
> (1) Whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals or well-being, or who is abandoned

by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship; or

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent, guardian or other custodian, is an unfit place for such child to live in, or whose mother is unmarried and without adequate provision for care and support." Act No. 288 of 1939, as amended by Act 54 of *Public Acts* of 1944, *Michigan Statutes Annotated* 27.3178 (598.2) Sec. 2 (b).

"Whenever any person gives information to the juvenile division of the probate court that a child is within the provisions of this chapter, a preliminary inquiry may be made to determine whether the interest of the public or of the child require that further action be taken. If it appears that formal jurisdiction should be acquired, the court shall authorize a petition to be filed.

"The petition shall be verified and may be upon information and belief. *It shall set forth plainly the facts which bring said child within the provisions of this chapter* • • •." Act No. 288 of 1939, as amended by Act 54 of *Public Acts* of 1944, *Michigan Statutes Annotated*, 27.3178 (598.11) Sec. 11.

"After a petition shall have been filed and after such further investigation as the court may direct • • • the court may dismiss said petition or may issue a summons reciting briefly the substance of the petition, and requiring the person or persons who have the custody or control of the child, or with whom the child may be, to appear personally and bring the child before the court at a time and place stated: Provided, That the court in its discretion may excuse but not restrict children from attending the hearing. If the person so summoned shall be other than the parent or guardian of the child, then the parents or guardian, or both, shall also be notified of the petition and of the time and place appointed for the hearing thereon, by personal service before the hearing, except as hereinafter provided • • •." Act No. 288 of 1939, as

amended by Act 54 of *Public Acts* of 1944, *Michigan Statutes Annotated*, 27.3178 (598.12) Sec. 12.

"Service of summons may be made anywhere in the state personally, or by the delivery of true copies thereof to the persons summoned: Provided, That if the judge is satisfied that it is impracticable to serve personally such summons or the notice provided for in the preceding section, he may order service by registered mail addressed to their last known addresses, or by publication thereof, or both, as he may direct. *It shall be sufficient to confer jurisdiction if* (1) personal service is effected at least 72 hours before the date of hearing; (2) registered mail is mailed at least 5 days before the date of hearing if within the state or 14 days if outside of the state; (3) publication is made once in some newspaper printed and circulated in the county in which said court is located at least one week before the time fixed in the summons or notice for the hearing. * * * " Act No. 288 of 1939, as amended by Act 54 of *Public Acts* of 1944, *Michigan Statutes Annotated*, 27.3178 (598.13) Sec. 13.

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." *Constitution of the United States of America*, Article I, Section 9; *Constitution* (1908) *of the State of Michigan*, Article II, Section 11.

"No person shall * * * be deprived of life, liberty or property, without due process of law." 5th Amendment of the *Constitution of the United States of America, Constitution* (1908) *of the State of Michigan*, Article II, Section 16.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws." 14th Amendment, *Constitution of the United States of America.*

(e) Petitioner, and appellee below, petitioned the Berrien County Circuit Court for writs of habeas corpus to respondents, together with ancillary writ of certiorari to the Berrien County Probate Court, to gain custody of his two minor children being illegally detained by stranger respondents. At the time of hearing on said petitions, respondents appeared in Circuit Court with counsel and presented motions to dismiss on the ground that said children were under the jurisdiction of the Juvenile Division of the Probate Court, although said Probate Court did not see fit to enter the case except to comply with the order of certiorari. Motion to dismiss was denied, and the circuit judge took the matter under advisement and subsequently handed down an opinion in favor of Petitioner. Respondents appealed said decision to the Michigan Supreme Court solely on jurisdictional grounds, question of Petitioner's fitness going unchallenged. The Michigan Supreme Court, in a divided opinion, affirmed the Circuit Judge below, stating that the Juvenile Division of the Probate Court had never legally acquired jurisdiction of said minors and that "the record does not show by what means the two children came into custody of defendants. There is no lawful order in the record before us granting custody of the two minor children to defendants." This decision was rendered December 24, 1957, and December 31, 1957, Mr. Justice Sharpe, who wrote the majority opinion, retired, having attained the age of 70 years. He was succeeded by Mr. Justice Kavanagh who was Attorney General for the State of Michigan at the time this case was originally under consideration, and who had been duly served copies of briefs as a party in interest.

In January, 1958, following the retirement of Mr. Justice Sharpe, Appellants below successfully sought, over Appellee's objections, a rehearing of this case, and subsequently obtained a reversal of the original decision. Mr. Justice Kavanagh participating and reversing his predecessor. The three opinions appended hereto as Exhibit "B" indicate that the Supreme Court considered only questions which had already been considered, settled and were the

law of the case or res judicata. Original briefs and appendices were used and oral argument was denied.

(f) The Federal questions of due process of law and discrimination were first raised in the Michigan Supreme Court when it granted a rehearing of this case contrary to its previous decisions, and when all aspects of same had been adjudicated, and subsequently, when it held to the contrary in the companion case of *Fritts vs. Krugh*, opinions of which are appended hereto, and the Federal question of the privilege of writ of habeas corpus not being suspended was first raised when the Michigan Supreme Court reversed itself. Federal questions were promptly presented to the Michigan Supreme Court by an Application for Rehearing under the rules of that Court. Rehearing was denied without a written opinion being filed.

ARGUMENT

Petitioner, before proceeding further desires to establish timeliness in his raising of federal questions involved, thereby invoking jurisdiction of the Supreme Court of the United States.

Great Northern Ry. Co. vs. Sunburst Oil & Refining Co., 287 U. S. 358; *Missouri ex rel. Missouri Ins. Co. vs. Gehner*, 281 U. S. 313; and *Herndon vs. Georgia*, 295 U. S. 441, hold that a federal question first raised on petition or motion for rehearing is made in apt time where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right.

Petitioner respectfully submits that until the reversal by the Michigan Supreme Court was rendered and said Petitioner taken by complete surprise by reason of Mr. Justice Kavanagh, who had been a party in interest, participating and reversing his predecessor, Mr. Justice Sharpe, and by further reason of reversal of a previously settled case affirming the Circuit Judge below, as well said Supreme Court disregarding the pertinent statute involved in this case (citing as its authority a case which had not as yet been reported, the companion case of *Fritts vs. Krugh*, and which when finally decided was irreconcilable to the opinions expressed in the instant case), there had been no reason for raising federal questions, other than the gen-

eral constitutional right of habeas corpus. Petitioner had been successful in the Circuit Court and, likewise, in the Michigan Supreme Court, and was cognizant that there were no justiciable reasons for a rehearing, and although he was aware of a change in the composition of the court personnel, he was secure in the knowledge that this had been declared by the Supreme Court of Michigan to be, in itself, no reason for allowing a rehearing. *People vs. Evening News Ass'n*, 51 Mich. 11; *Scott vs. Sullivan*, 164 Mich. 467.

Petitioner respectfully submits that the opinions written by Mr. Justice Edwards in Exhibits "A" and "B", and the minority opinions rendered by Justices Smith and Black in the companion case of *Fritts vs. Krugh*, Exhibit "C", reflect disfavor and disdain on the use of the constitutional right of habeas corpus. We submit that this right is an inalienable right of an American citizen, and courts are without power to capriciously disregard it for hypothetical sociological reasons.

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." *Constitution of the United States of America*, Article I, Section 9; *Constitution* (1908) *of the State of Michigan*, Article II, Section 11.

> "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen vs. Johnston*, 306 U. S. 19, 26, 27.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 14th Amendment, *Constitution of the United States of America.*

"The courts are without power to deprive those entitled to the benefits of certain acts unless they are expressly precluded therefrom by its provisions." *Copper Range Co. vs. Mich. Unemployment Compensation Commission*, 320 Mich. 460.

"No sociological principle can confer legislative power on the courts to correct mistakes in unambiguous laws." *People vs. Lowell*, 250 Mich. 349; *People vs. Woodworth*, 250 Mich. 436.

Petitioner further submits that in the two opinions written by Justices Smith and Edwards, which resulted in reversal of the first decision in this case, the Court arbitrarily concludes that there was jurisdiction in the Probate Court, thus ignoring the statutory requirements for obtaining jurisdiction, compliance with which was not had. It is submitted that the Court, in the second decision, usurped legislative power, and summarily denied Petitioner due process of law, there never having been the required notice to Petitioner's wife, nor a Hearing of any kind for the taking of jurisdiction of these children.

"No person shall * * * be deprived of life, liberty, or property without due process of law." 5th Amendment, *Constitution of the United States of America; Constitution* (1908) *of the State of Michigan*, Article II, Section 16.

"Due process of law requires notice and opportunity to be heard." *Dation vs. Ford Motor Company*, 314 Mich. 152.

"Every person is entitled to his day in court whenever his interests are involved, and to due notice of the proceedings, and to reasonable opportunity to appear and defend." *Noyes vs. Hillier*, 65 Mich. 636; *Prince vs. Clark*, 81 Mich. 167; *City of Grand Rapids vs. Powers*, 89 Mich. 94; *Township of Caledonia vs. Rose*, 94 Mich. 216.

The court may not give effect to an intent contrary to the language of the statute as written. *Roosevelt Oil Co. vs. Alger*, 339 Mich. 679.

The courts cannot delete from or nullify the plain provision of a statute. *Bridghampton. School Dist. No. 2, Fractional, of Carsonville vs. Supt. of Public Instruction,* 323 Mich. 615.

The remedy for defects in the law is with the legislature. *Thayer vs. Mich. Dept. of Agr.,* 323 Mich. 403.

In the interpretation of a statute, the Supreme Court is bound by the language of the legislature, read in the light of previously established and recognized rules of common law. *Benge vs. Mich. National Bank,* 341 Mich. 441.

It is obvious that a court cannot, under the guise of constructions or interpretation, read into a statute provisions which the legislature did not see fit to incorporate therein, and thereby enlarge the scope of the provisions of the statute. *Ford Motor Co. vs. Appeal Bd. of Mich. Unemployment Compensation Commission,* 316 Mich. 468.

Questions concerning the wisdom, justice, policy or expediency of a statute are for the legislature alone. *Lawrence Baking Co. vs. Mich. Unemployment Compensation Commission,* 308 Mich. 198, 323 U. S. 738.

Petitioner further submits he was arbitrarily discriminated against and denied equal protection of the laws. Such discrimination is openly conceded by three of the Justices who reversed the instant case, in their dissenting opinion in the companion case of *Fritts vs. Krugh.* We respectfully quote from pages 12 and 13 of Justice Black's opinion, concurred in by Justices Voelker and Smith, in Exhibit "C" appended hereto:

"In the recent and duplicating case of Harmsen vs. Fizzell, 351 Mich. 86, 106, Mr. Justice Edwards, supported by this writer and two other members of the court, found occasion to consider the general rule to which I refer. After having treated 'technical legal problems' brought here in Harmsen to test jurisdiction of the same juvenile division, our Brother went on to say:

> 'More needs, however, to be said, for this case does not involve a criminal proceeding where the right of a person to freedom from restraint is at issue. What is sought here is the use of the writ of habeas corpus as a substitute for statutory appeal to review long past orders of the probate court or to gain a hearing de novo on the issues purportedly adjudicated therein.'

"I rise to remark that Harmsen was a proceeding in habeas corpus, wherein 4 present members of our Court headed by Justice Edwards wrote to sustain Berrien county probate (juvenile division) jurisdiction — as against habeas corpus in Berrien circuit — on this sound premise:

> 'Children are not chattels to which legal title may properly be determined by a technical writ.'

"Yet, here our Brother writes to yield juvenile division jurisdiction over — as well as jurisdictional title to — these children, and to do so by issuance of 'technical writs.' And this he does after having just extolled the superior virtues and advantages of the juvenile division, with its 'special jurisdiction, special powers of disposition, and specialized staffing as to children's problems in dependency and delinquency cases.' (Sovereign v. Sovereign, handed down this day, ante P. .....). Quid est? Or is there something 'special' about the jurisdiction of the Berrien juvenile division which requires that its advantages be applied to Ruth and David Harmsen but not to the equally needful Sally and Doyle Fritts?".

As further and additional reasons for Petitioner's claim that he was discriminated against, we invite the Learned Court's attention to the fact that Mr. Justice Kavanagh, who was a party in interest as Attorney General at the time this case was first considered, and upon whom service of briefs and appendices had been had by reason thereof, participated in the consent to a rehearing and reversed his predecessor. After this was called to the Court's attention, he withdrew from participation in the companion

case of *Fritts vs. Krugh* which decision was subsequently handed down, and which decision is irreconcilable with the decision in the instant case. The granting of a rehearing strictly on the grounds of a change in composition of the court, no new justiciable matter being presented, was contrary to the fundamental principles of law and justice.

A judgment should not be vacated or nullified by a different justice sitting in same branch of court. *Public Service Commission, First Dist. v. Brooklyn Borough Gas Co.*, 175 N.Y.S. 28, 106 Misc. 549 affirmed 176 N.Y.S. 918, 188 App. Div. 935.

Although a state court of last resort has power, in a proper case to overrule its prior opinions, the rule of stare decisis is frequently invoked where a question is presented which had been previously determined in the same court, in which case it applies with full force, even though the question is determined differently in other states; and an opinion of one judge is ordinarily held binding on another judge in the same court, or in the same department of the court, although it is contrary to a decision in another state. 21 *C.J.S.* (Courts) Sec. 196, Page 341 and 342; *U. S. — Sterrett v. Second Nat. Bank of Cincinnati, Ohio*, 39 S. Ct. 27.

A prior decision on the same facts is an authority, and not to be ignored, even though the parties to the instant case were not parties in the original case, and are therefore not bound by the decision. *U. S. Utilities Production Corp. v. Carter Oil Co.*, C.C.A. Okl., 72 F. 2d 655, affirming D. C., 2 F. Supp. 81.

The doctrine of the law of the case * * * expresses the practice of the courts generally to refuse to reopen what has been previously decided in the same case * * *. It is founded on public policy, in the interests of orderly judicial procedure * * *. 21 *C.J.S.* (Courts) Section 195, Pages 330 and 331.

The law of the case, res judicata, and stare decisis belong to the same family in that they have in view the termination of controverted questions of fact and law. The law of the case, however, is distinct from res judicata, in that the law of the case does not have the

finality of the doctrine of res judicata, and applies only to the one case, whereas res judicata forecloses parties or privies in one case by what has been done in another case, although in its essence it is nothing more than a special and limited application of the doctrine of res judicata or former adjudication, and what is known as the "law of the case", that is, the effect and conclusiveness of a former decision in the subsequent proceedings in the same case, has been generally put upon the ground of res judicata. 21 *C.J.S.* (Courts) Sec. 195, Page 331; *Darling vs. Abbott*, 221 Mich. 449.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

A. H. Lee,
Counsel for Petitioner.

Member Bar U. S. Supreme Court
(March 29, 1937)